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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JOHNNY O., A Person Coming  
Under the Juvenile Court Law.

H026985  
(Monterey County  
Super. Ct. No. J38556)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY O., A Minor,

Defendant and Appellant.

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Fourteen-year-old Johnny O. was made a ward of the juvenile court and granted probation with gang conditions for a first degree robbery (Pen. Code, §§ 211, 212.5)<sup>1</sup> committed on December 4, 2003. He appeals, contending that evidence that the offense was perpetrated in an inhabited dwelling house was insufficient and that the gang conditions are constitutionally overbroad.

FACTS

Early in the evening of December 4, 2003, street vendor Luis Ortiz was pushing his bread cart down Alamo Way in Salinas when three boys armed with a “tube” that looked “like a bat,” and a “knife or blade” stopped him. One of them told Ortiz in Spanish that “if I didn’t give him the money he was going to break my head” while the boy with the tube struck Ortiz on the arm and then with the third boy restrained him and

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise stated.

removed his money and wallet from his pockets. They got \$160. Later that evening, Ortiz picked defendant and another perpetrator out of a four-person street show-up. Defendant admitted to a police officer that he had been there with another boy at the time of the robbery.

The defense presented the testimony of defendant's aunt that he had been in her apartment for several hours the day that the robbery occurred. She also testified that at some point he left her apartment. A witness to the robbery, Irma Bedolla, testified she did not identify defendant in the showup.

A Welfare and Institutions Code section 602 wardship petition was filed against defendant charging that he committed first degree robbery. The petition was sustained and defendant was placed on two years' probation with conditions which he does not challenge except the following: The clause of condition No. 8 stating, "You are not to associate with any member of any gang as directed by your probation officer"; condition No. 9, "You shall not possess, wear, use or display any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia associated with membership or affiliation with a gang, . . ."; condition No. 11, "Not [*sic*] use or possess alcohol/narcotics, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons who use or traffic in narcotics or other controlled substances"; and condition No. 13, "You shall possess no weapons or any type of ammunition." This appeal ensued.

#### ISSUES ON APPEAL

Defendant challenges (1) the sufficiency of the evidence that the robbery occurred in an inhabited dwelling house, trailer coach, or inhabited portion of a building as was charged in the wardship petition, and (2) the absence of a knowledge requirement in the probation conditions listed above.

### SUFFICIENCY OF THE EVIDENCE

Defendant asserts that because the incident with Ortiz occurred on the street, he was not guilty of first degree robbery, that is, robbery in an inhabited dwelling. The People concede the correctness of this contention but state the judgment need not be modified because the trial court did not find, “ ‘either by numerical designation or a sufficiently clear description of the offense’ (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 581), that the degree of the robbery was first degree. ‘Because the court failed to find the degree of the offense, it is deemed to be of the second degree. (Pen. Code, § 11157 [*sic*, 1157].)’ (*In re Eric J.* (1979) 25 Cal.3d 522, 529.)”

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (§ 211.) First degree robbery is the robbery of a person who is performing his or her duties as an operator of a bus, taxicab, street- or cable car, etc., robbery of a passenger of such a vehicle; and robbery in an inhabited dwelling house, the inhabited portion of any other building, or in an inhabited vessel, floating home, or trailer coach. (§ 212.5.) The petition accused the minor of committing the crime of “VIOLATION OF CALIFORNIA PENAL CODE SECTION 211, a FELONY, committed as follows, to wit: That at said time and place the said minor did unlawfully and by means of force and fear take personal property from the person, possession and immediate presence of LOUIS ANTONIO ORTIZ and said offense was perpetrated in an inhabited dwelling house, trailer coach and inhabited portion of a building. NOTICE: The above offense is a serious felony within the meaning of Penal Code Section 1192.7 [subdivision] (c) and a violent felony within the meaning of Penal Code 667.5 [subdivision] (c).” (Original emphasis.)

At the close of testimony, the trial court stated, “There’s no doubt in my mind that [defendant] participated in and was a principal to this robbery based on the testimony I’ve heard. [¶] I find the petition to be true or sustained and we’ll set the matter for a

dispositional hearing. . . .” As the People stated, the trial court did not make an express finding on the degree of robbery. The contested jurisdictional hearing minute order stated that the court heard evidence as offered by the petitioner and minor and “[d]etermines allegations of petition to be [¶] true as to Counts [sic], 1 . . . .”

In an abundance of caution and because sustaining the petition without striking the language that the robbery was perpetrated in an inhabited dwelling house, trailer coach and inhabited portion of a building and that the offense was a serious and violent felony could cause defendant serious and undeserved problems in the future, we will order this language stricken and order the judgment modified to show the petition was sustained as to the lesser included offense of second degree robbery.

#### GANG CONDITIONS

Next, defendant contends that the complained-of probation conditions are constitutionally overbroad and must be modified to include a knowledge requirement. Conditions forbidding defendant from associating with persons not known to him to be gang members and displaying indicia not known to him to be gang related were constitutionally overbroad. (*People v. Lopez* (1998) 66 Cal.App.4th 615; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102-103.) *People v. Garcia* also held that a condition requiring the defendant to refrain from associating with persons not known to the defendant to be users and sellers of narcotics was also not “sufficiently narrowly drawn.” (*People v. Garcia, supra*, 19 Cal.App.4th at p. 102.) Defendant argues this rationale also applies to condition No. 13 regarding possessing weapons or ammunition.

The People state that since defendant did not object to these conditions in the trial court, he has waived the objections. (See *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*).) However, the People also concede that defendant is challenging the conditions on constitutional grounds which defendant argues *Welch* allows to be heard as “pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.” (*Id.* at p. 235.)

As for condition No. 8, the court ordered that defendant's associates were to be approved by his probation officer and his parents or guardians and that he was not to associate with any individuals that the probation officer determined were either threats to his successful completion of probation or were gang members. Since the probation officer had the responsibility to supply defendant with the knowledge that specific individuals were associates forbidden to him by condition No. 8, a sufficient knowledge requirement was written in to the condition.

Condition No. 9 does not have a knowledge requirement written into the prohibition to possess, wear, use or display any gang insignia, clothing, etc., although it does require the probation officer to identify "any item . . . posing a threat to your successful completion of probation." Defendant does not complain of the latter clause. As to the former clause and as to conditions Nos. 11 and 13, they will be ordered to be rewritten to add a knowledge requirement.

#### DISPOSITION

The contested jurisdictional hearing minute order should be modified to show that the court sustained the petition as to a violation of Penal Code section 211, second degree robbery, a lesser included offense of count 1. With the probation conditions modified as set forth below, the judgment is affirmed.

The changes are italicized for clarity. Condition No. 9 should read: "You shall not possess, wear, use or display any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia *known to you to be* associated with membership or affiliation with a gang, or any item identified by your probation officer as posing a threat to your successful completion of probation."

Condition No. 11 should read, "*You shall* not use or possess *alcohol, narcotics, drugs, or other controlled substances without the prescription of a physician; you are not to* traffic in, or associate with persons *known to you to* use or traffic in narcotics or other

controlled substances.” Condition No. 13 should read, “You shall *not knowingly* possess *any* weapons or any type of ammunition.”

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Mihara, J.